No. 84-1814

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In The

Supreme Court of the United States

October Term, 1984

QUENTIN MEADOWS,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Do the Sixth and Fourteenth Amendments of the United States Constitution demand reversal of two convictions for two jointly-tried robberies where evidence of a lineup identification made by one victim of one robbery was admitted at trial, the lineup having been fair and unsuggestive, and there having been an adequate independent basis for the identification, where identifications were made by two other victims of the two robberies, one of whom was a victim of both crimes, and neither of whom was present at the lineup, because the petitioner's counsel, who was notified of the court-ordered, post-indictment lineup, was not present for the lineup?

2. Do the Sixth and Fourteenth Amendments of the United States Constitution prohibit the use of post-arrest statements, made following the administration of *Miranda* warnings, but obtained in violation of the New York State laws governing the right to counsel, for impeachment purposes at trial?

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BRIEF FOR RESPONDENT

STATEMENT OF OPINIONS BELOW AND JURISDICTION

The petitioner has adequately set forth the opinions of the courts below, which are reproduced in the appendices of the petition.

The petitioner has also adequately stated the jurisdictional basis upon which he is seeking certiorari.

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defense.

Section One of the Fourteenth Amendment to the United States Constitution states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Twice within eight days in October 1980, the petitioner robbed the same gas station in Nassau County, New York. On the first occasion, October 21, 1980, the petitioner robbed the station's

attendant, John Taylor, and his cousin, James Alviti, at gun point. The next day, the victims identified the petitioner as the robber from a photopack and from an array of sixteen slides.[1] Eight days later, on October 29, 1980, the petitioner returned to the gas station. At gun point, he robbed Taylor again and his fellow employee, Vincent Rizzuto.

Taylor called the police and, having recognized the petitioner from the first robbery, told them that the petitioner had robbed him a second time. Both Taylor and Rizzuto identified the petitioner from a photopack as the person who had just robbed them.

On November 7, 1980, the petitioner was arrested pursuant to a warrant and confessed to having committed both robberies. Subsequently, the petitioner was indicted. On May 19, 1981, a court-ordered lineup in which the petitioner participated was held. Rizzuto was the only one of the three victims present. He identified the petitioner as the man who had robbed him on October 29, 1980. Although the petitioner's attorney had been notified of the scheduled lineup, he did not attend.

The petitioner moved to suppress the identifications and his post-arrest statements. The hearing court found that neither photographic arrays (photopack and slides), nor the lineup was unduly suggestive. Furthermore, the court found that "each of the three victims had an independent source for in-court identifications, based on their observations during the robberies." *People v. Meadows,* 64 N.Y. 2d 956, 957 (1985) (10A-11A).[2] The

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1. These facts except where noted, are paraphrased, or quoted, from the opinion of the New York Court of Appeals (64 N.Y. 2d 956), which is also set forth beginning at 9A of the petitioner's Appendix C.

2. The numbers in parentheses, followed by the letter "A," refer to those pages of the petitioner's Appendix C.

court reached the conclusion that the petitioner had not been denied his right to counsel at the lineup because of his attorney's refusal to be present. The court also found that the petitioner's statements could be used at trial to impeach his credibility.

At trial, Taylor, Alviti and a third witness to the first robbery testified. Taylor and Alviti identified the petitioner as the person who had robbed them; the third witness was not able to make an identification. In regard to the second robbery of October 29, 1980, Taylor and Rizzuto both testified and identified the petitioner as the robber. Rizzuto also testified to having identified the petitioner at the lineup.

The petitioner testified at trial that he had not committed the robberies. The prosecutor impeached the petitioner's testimony on cross-examination with his prior admissions. Also, on rebuttal, the prosecutor called the policeman, Detective Howell, who had taken the petitioner's statements. Detective Howell testified that the petitioner had admitted committing the robberies, thereby also impeaching the petitioner's testimony.

The petitioner raised these issues on appeal in the Supreme Court of the State of New York, Appellate Division, Second Department. That court unanimously affirmed the judgment of conviction without opinion. *People v. Meadows,* 102 A.D. 2d 1016 (2d Dept. 1984). The New York Court of Appeals granted the petitioner leave to appeal [62 N.Y.2d 988 (1984)], and on March 21, 1985, after considering the same issues which had been raised below and two of which are raised here, that court held that "any error in the admission of the lineup evidence would not require reversal (*see People v. Adams,* 53 N.Y. 2d 241, 252)." *People v. Meadows,* 64 N.Y. 2d 956, 958 (1985) (12A). That court also found that the petitioner's statements were properly used for impeachment purposes. *Ibid.*

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

The petition sets forth two grounds: one involving a claim of a denial of a right to counsel, which purportedly rendered a lineup identification inadmissible, and the other concerning the allegedly improper use of a statement, obtained in violation of New York State's right to counsel law, solely for impeachment purposes. Neither issue presents a question of nationwide importance which would justify the granting of the petition. The first issue is *sui generis*; the second is actually predicated upon the rights of an individual as defined by a more restrictive state, not federal law. Thus, the use of the statements obtained in contravention of that law is not a matter of federal concern, and this petition should be denied.

A. The Admission of Testimony Concerning One Victim's Identification of the Petitioner at a Lineup Conducted in the Absence of Counsel Did Not Violate Any of the Petitioner's Constitutional Rights.

Subsequent to indictment, the trial court ordered a lineup to be conducted. The petitioner's counsel was notified of the date, but, despite this notification, and telephone calls which were placed to his office on the morning of the lineup, counsel was not present when the lineup was conducted later that day.

At trial, the single witness who viewed the lineup, Vincent Rizzuto, identified the petitioner as the person who robbed him on October 29, 1980. He also testified to having identified him at the lineup. His testimony, however, was not the only evidence connecting the petitioner with the commission of the crime. John Taylor, who was also robbed on that date, identified the petitioner

as the perpetrator. His testimony was crucial. Taylor also testified that it was the petitioner who had robbed him at the same location only eight days before, and that he recognized the petitioner at the time of the second robbery from the first crime. There was yet another eyewitness at trial. This third witness, James Alviti, had been present at the first robbery and testified that it had been the petitioner who had committed that crime.

Prior to trial, a suppression hearing had been held. The court found that Rizzuto, Taylor and Alviti all had sufficient independent bases for their in-court identifications of the petitioner. The petitioner failed to present any evidence at the hearing concerning why his attorney had absented himself from the lineup. The hearing court found that counsel had waived his presence at the lineup and ruled that to suppress Rizzuto's testimony concerning the lineup identification solely because of counsel's absence would, in effect, sanction an excessive abuse of the legal system, since counsel had a chronic record of non-attendance in court. Such a determination was not without precedent within New York State [see People v. Styles, 90 Misc. 2d 861 (S. Ct. N.Y. Cty. 1977), *aff'd*, 71 A.D. 2d 1066 (1st Dept. 1979)] or in other jurisdictions. *Cf., Jenkins v. State*, 167 Ga. App. 840, 308 S.E. 2d 14, 16 (1983) ("Counsel for defendant made a conscious decision not to attend lineup. He may not now complain.").

Policy reasons for sustaining this determination aside, as the New York Court of Appeals held, "[i]n the face of three in-court identifications by eyewitnesses, *the evidence of Rizzuto's lineup identification added little to the already overwhelming evidence of guilt.*" *People v. Meadows*, 64 N.Y. 2d 956, 958 (1985) (emphasis supplied). Therefore, the court continued, "any error in the admission of the lineup evidence would not require reversal (*see People v. Adams*, 53 N.Y. 2d 241, 252)." *Ibid.* Clearly, then, that court resolved the issue by applying a harmless error analysis,

and, finding the petitioner's guilt to have been established by overwhelming evidence, perceived no reason to disturb either conviction.

Thus, resolution of the issue presented here depends upon evaluation of its own particular facts, which, in turn, limits its value as precedent. Even in New York, following this decision, cases in which an attorney is not present for a post-indictment, court-ordered lineup, and testimony concerning that lineup is later admitted at trial, will have to be decided on a case-by-case basis. The determination of whether there is legally sufficient evidence to sustain a conviction without that testimony can only be made individually. Since it has long been decided what the standards are against which such evidence is to be evaluated [*see Chapman v. California,* 386 U.S. 18 (1967)], this case presents no new question of law. Any decision by this Court on, what is, in actuality, only a tangential issue, *e.g.*, the admissibility of testimony concerning an identification from a lineup held in the absence of counsel, would have only a minimal impact on law nationwide. Therefore, this issue is not worthy of this Court's consideration.

B. The Petitioner's Statement, Although Obtained in Violation of His State Right to Counsel, was Admissible at Trial for Impeachment Purposes.

The petitioner was arrested pursuant to an arrest warrant, informed of his constitutional rights and, upon waiving them, gave a statement inculpating himself. This statement could not be used by the respondent on their direct case because at the time it was made, the petitioner's right to counsel had already attached under New York law, and he had not waived his right to counsel in the presence of counsel. *People v. Samuels,* 49 N.Y. 2d 218 (1980). After the petitioner had testified at trial and had denied having committed the robberies, however, the prosecutor

impeached the petitioner's testimony by using that statement both on cross-examination and on rebuttal under the authority of *Harris v. New York,* 401 U.S. 222 (1971) and *Oregon v. Hass,* 420 U.S. 714 (1975). This procedure was approved by the New York Court of Appeals. *People v. Meadows,* 64 N.Y.2d 956, 958 (1985) (12A).

Relying on the decision of the Court of Appeals for the Second Circuit in *United States v. Brown,* 699 F.2d 585 (2d Cir. 1983), the petitioner claims that under federal law a statement obtained in violation of the right to counsel cannot be used for impeachment purposes. However, *Brown* is inapposite because the issue posited by the petitioner involves a violation of New York law, specifically *Samuels,* which itself is based on New York statutory definitions. Because the right to counsel which has been transgressed is one peculiar to New York State (*compare with Kirby v. Illinois,* 406 U.S. 682 (1972)], even though there is superficial conflict between state and federal law, no federal right has been violated, and no issue of sufficient magnitude for this Court's consideration has been presented.

Moreover, there is no actual conflict between the laws of the two jurisidictions. The Second Circuit's holding in *Brown* was based upon this Court's ruling in *New Jersey v. Portash,* 440 U.S. 450 (1979), which involved the use of immunized grand jury testimony, "the essence of coerced testimony" (*id.* at 459), for impeachment purposes. It was the involuntary nature of Portash's statements (*see also, Mincey v. Arizona,* 437 U.S. 385 [1978]), rather than the violation of a constitutional right, as in *Harris v. New York,* 401 U.S. 222 (1971), which rendered their use as impeachment material impermissible. The petitioner's statements were not involuntary due to the exercise of coercion or the threat of contempt; they were merely unusable on the respondent's direct case because they were obtained in violation of the more restrictive New York State right to counsel which had attached simply because a felony complaint had already been filed. Thus, the precedent

advanced by the petitioner is distinguishable and does not require this Court to reconcile the two situations.

In any event, it does not appear that the Second Circuit will follow its decision in *Brown* under all circumstances. In *United States v. Foley,* 735 F. 2d 45, 49 (2d Cir. 1984), in *dictum,* that court noted that "a statement obtained in violation of the constitution can be used to impeach a defendant," and cited *Harris* as controlling authority as well as *Brown.* This Court had the opportunity to consider this question when Foley's co-defendant, John Elder, sought a writ of certiorari, but it denied his petition. *Elder v. United States,* ____ U.S. ____, 105 S. Ct. 915 (1985). Since the issue presented here involves a violation predicated solely on a state-created right and is not in conflict with any federal guarantees, this petition, too, should be denied.

CONCLUSION

The petition for a writ of certiorari must be denied.

Respectfully submitted,

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